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IN THE

# Supreme Court of the United States

OCTOBER TERM 1970

No. 42

A. B. HALE, as Chairman and E. A. McCOLLISTER, et al., etc.,

Appellants,

vs.

BIMCO TRADING, INC., and BROWARD COUNTY PORT AUTHORITY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF FLORIDA

## BRIEF ON BEHALF OF APPELLEES


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# IN THE
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BIMCO TRADING, INC., and BROWARD COUNTY PORT AUTHORITY, *Appellees.*

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## BRIEF OF APPELLEES

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### STATEMENT OF FACTS

Bimco Trading, Inc., the original plaintiff, a New York corporation, is an importer of cement manufactured in Denmark and Belgium. (R-1) The intervening plaintiff, Broward County Port Authority is the governing body of Port Everglades, a deep water harbor located on the southeast coast of Florida. (R-55) One of its chief sources of revenue is the cement importations from the Scandinavian and other European countries. Between the time of the passage of the Legislative Act complained of in this case, and the time of the injunction by the court below, Port Everglades lost practically all of the freight business from Europe, not only the cement business but other business as well. Consequently the Act seriously affected the financial condition of the Port. The Act of the Legislature, which is attacked herein, requires that cement imported from foreign

countries, be inspected before it can be sold or used i
the State of Florida. Cement from other states is no
subject to any inspection. The cost of inspection is $3.0
per ton. The record shows that the cost of inspection here
tofore has been from $12.50 to $15.00 per shipload. On
cargo of 3,000 tons the cost of inspection would not nor
mally exceed $15.00; (R-3) under the terms of the Act, i
would be $9,000.00, which is six hundred times the norma
cost. The record shows that on a shipment already a
Miami at the time the injunction was granted, the cost o
inspection was $7,300.00 (R-43). The original bill of com
plaint alleged that this cement was of a high grade an
character, but sold for a price less than any manufacture
in the State of Florida, and consequently was attractive t
purchasers (R-2) and that the purpose of the Act was no
to protect the citizens of the State of Florida against in
ferior cements, but to benefit the Florida Portland Cemen
Company (R-3) which manufactured cement at Tampa
Florida, and was the only concern which so manufactured
cement in the State of Florida (R-3). The bill furthe
alleged that the plaintiff had contracts with citizens of th
State of Florida, for the sale of cement, (R-4) and that th
tax was so excessive and oppressive that the plaintiff coul
not afford to import the cement or pay the cost of such in
spection, and that it would lose its contracts and the profit
that it might thereby make (R-4). The plaintiff claimed
that the Florida Act was unconstitutional in the followin
respects:

(a) That it levied a tax on commerce between the United
States and foreign countries and constituted, as such,
direct burden on such commerce in violation of Article 1
Section 8, of the Constitution of the United States o
America. (R-4)

(b) That it likewise prohibited the importation into th
State of Florida of a legitimate article of commerce, also i

violation of Article 1, Section 8, of the Constitution of the United States of America (R-4).

(c) That it denied to the plaintiff and others similarly situated, the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States of America (R-4).

(d) That it levied an impost or duty under the misnomer of an inspection law in direct violation of Article 1, Section 10, of the Constitution of the United States of America (R-5).

(e) That it likewise infringed on the right of contract guaranteed by the Fourteenth Amendment to the Constitution of the United States and was in violation thereof (R-5).

The bill alleged that the defendants announced that they proposed to immediately enforce the Act and were about to appoint inspectors for that purpose (R-5), and that the enforcement of the Act would cause plaintiff irreparable injury. By an amendment to the bill it was alleged that the amount involved exceeded three thousand dollars (R-65) exclusive of interest and costs, and it likewise appeared that the original plaintiff and defendant were citizens of different states (R-1).

## ARGUMENT

### THE ACT IS CLEARLY UNCONSTITUTIONAL AND THE LOWER COURT RIGHTFULLY ENJOINED THE APPELLANTS.

It will be borne in mind that the Act does not require or even provide for the inspection of cement that is produced in Florida or in any of her sister states. Inspection is required only of cement "imported and brought into the State of Florida from any foreign country." The inspection fee must be paid only on cement imported and brought into the State of Florida from a foreign country.

Whether there shall be inspection or not and whether the sellers shall compensate the inspector or not, is made to depend entirely upon the place from which the cement is imported and brought into the State; that is, whether or not it is imported or brought in from a foreign country. If cement manufactured in Florida were shipped abroad, it could not be brought back without inspection.

In adopting the Act, the Legislature purported to do so under the guise of enacting an inspection law. It is apparent, however, that the purpose of the Act was not to inform the buyers and users of cement of the quality or kind of cement with which they were dealing, for no inspection whatever is required or provided for except with respect to cement imported from a foreign country. The purpose of the Act, therefore, is not the protection of the public against inferior cement. In the preamble to the Act, the Legislature finds that only 30% of the cement offered for sale and used in Florida is imported from a foreign country. Manifestly, if it is necessary for the protection of the people of the state that cement sold or used in the state be inspected and required to conform to the prescribed standard, such protection could only be given by inspecting the 70% of the domestic manufactured, as well as the 30% of the foreign-manufactured cement.

It does not require further argument to demonstrate that although avowedly enacted to protect the people of the state against inferior cement, the Act has no real or substantial relation to such an object, but only by its necessary operation is a regulation of commerce beyond the power of the state to establish. The exorbitantly high "inspection fee" of 15c on each 100 pounds or fraction thereof, although imposed in the name of compensation for the inspection, is in reality an onerous tax.

> "If a statute purporting to have been enacted to protect the public health, the public morals or the public

safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

*Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205 at 210.

"In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect."

*Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455.

*Henderson v. New York*, 92 U. S. 259, 23 L. Ed. 543.

The natural and reasonable effect of the present Act is to prohibit commerce in foreign-manufactured cement, and that must be considered its purpose.

That it is unconstitutional to require inspection from one place and not from another has been determined by this Court in many cases.

See *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678.

*Brimmer v. Rebman*, 138 U. S. 78, 34 L. Ed. 862.

*Voight v. Wright*, 141 U. S. 62, 35 L. Ed. 638.

*Foote v. Stanley*, 232 U. S. 494, 58 L. Ed. 690.

In the Voight case, supra, the Court had before it the question of the validity of a statute of Virginia, which provided that all flour brought into the state and offered for sale therein, should be inspected, and required the payment of a fee for such inspection. Flour made and sold in the state was not required to be inspected.

In the case of *Brimmer v. Rebman,* supra, there was a statute of Virginia which required that all meat slaughtered more than 100 miles from the place at which it was offered for sale, be first inspected and required a fee to be paid for such inspection.

The Court in holding that statute void as a burden on commerce, further said:

> "The statute is, in effect, a prohibition upon the sale in Virginia, of beef, veal o mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete upon equal terms, in the markets of that commonwealth, with those in the same business, whose meats, or like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus *made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered.*" (Italics ours).

Here, it is the place from which the cement is imported which the statute condemns. The four last cited cases seem to us to answer completely all the arguments that appellants have made or can make with reference to the validity of the tax and the Act involved herein.

The obvious purpose and effect of the Act, is to prevent cement imported from a foreign country from coming into competition with domestic cement, by levying a tariff on imported cement. It is not competent for any state to set up a tariff wall for the protection of the local industry. That function belongs solely to Congress.

The case of *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015, involved a statute of Pennsylvania which discriminated against imports from a foreign country. In holding the statute invalid, the Court relied upon its earlier decisions where state statutes discriminating against commerce between the states had been held invalid; and in declaring that *a rule applicable to commerce between the states was equally applicable to commerce with foreign nations, said:*

> "The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the states. If a tax assessed by a state injuriously discriminating against the product of a state of the Union is forbidden by the Constitution, a similar tax against the goods imported from a foreign state is equally forbidden."

Under the rule established in the cases, supra, the Act is plainly in contravention of the commerce clause of the Federal Constitution.

There are many uses for cement where a cement of a lower standard than that fixed in the Act may be very properly used, and there is no legitimate basis for entirely excluding from commerce such cement. Certainly, the safety of the public does not require that a person who wishes to lay a concrete walk in his private flower garden, should be prohibited from using a cement not of the approved standard for highway construction. Nevertheless, no cement from a foreign country may be even used in Florida under the terms of this Act.

We are not here dealing with an article of food unfit for human consumption, but with a lawful subject of commerce.

It is well settled that a state cannot prevent the importation of lawful subjects of commerce.

*Austin v. Tennessee*, 179 U. S. 243, 45 L. Ed. 224.

*Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49.

*Lyng v. Michigan*, 135 U. S. 161, 34 L. Ed. 128.

*Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128.

Nor has the state the power to prevent the sale of a legitimate article of commerce.

*Collins v. New Hampshire*, 171 U. S. 30, 43 L. Ed. 60.

*Leisy v. Hardin*, supra.

It should be noted also that Section 2 of the Act makes it unlawful to sell, offer for sale or use any cement of a standard below that fixed in the Act, if such cement is imported or brought into the State from any foreign country. Yet, with the exception of use in a limited class of buildings specified in Section 1 of the Act, it is not unlawful to sell, offer for sale or use cement below the fixed standard, if it is of domestic manufacture.

The Patapasco case, upon which appellants rely so strongly, provided for the inspection of all fertilizers with a uniform fee for such inspection of all kinds whether foreign or domestic, or from other states. In other words, an equal and impartial inspection wholly unlike the Florida law.

It is thus apparent that cement of a grade below the fixed standard was not considered by the Legislature to be an unfit article of commerce. The prohibition against the importation, therefore, was not laid because of the quality of the cement, but solely in order to preclude competition.

It is submitted that the Act violates the provisions of the United States Constitution as alleged in the bill of complaint and that the lower court rightfully enjoined its enenforcement.

## SAID ACT ALSO VIOLATES THE RECIPROCAL TRADE AGREEMENT CONVENTION OR TREATY ENTERED INTO AND NOW EXISTING BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND BELGIUM.

The Florida law in question discriminates against cement imported from foreign countries and hence is a burden on foreign commerce and the so-called inspection fee is so excessive and unreasonable as to constitute an undue and unconstitutional burden on foreign commerce even though it did not violate reciprocal trade agreements between the United States of America and foreign countries at this time, but it emphatically does violate now existing trade treaties, as clearly appears from the affidavit of Secretary of State, Hon. Cordell Hull (R-47-54). This matter is most important when considered in the light of this existing reciprocal trade agreement and in the light of foreign commercial relations between the United States and other countries, and particularly in relation to the trade agreement between the United States and the Belgo-Luxemburg Economic Union, signed February 27, 1935. In this trade agreement, which was concluded by the President of the United States under the authority of the so-called Trade Agreements Act of 1930, the United States granted a reduction of one and one-half cents a hundred pounds in the customs duty applicable to Roman, Portland and other hydraulic cement or cement clinker of Belgium or Luxemburg origin. In return for this and other concessions and assurances granted by the United States, the Belgo-Luxemburg Economic Union granted important customs advantages to products of the United States imported into Belgium and Luxemburg. Under the provisions of the Trade Agreements Act, the rates of duty and other import restrictions proclaimed by the President under the authority of the Act in connection with trade

agreements are extended to articles, growth, produce or manufacture of all countries which have not been found by the President to discriminate against the commerce of the United States. The rate of duty of four and one-half cents a hundred pounds applicable to hydraulic cement, which was proclaimed by the President on April 1, 1936, pursuant to the trade agreement with the Belgo-Luxemburg Economic Union, is, therefore, the effective rate of duty applicable to cement imported from all non-discriminating countries. At the present time this rate is applicable to cement imported from all countries except Germany and Australia.

The inspection fee provided for in the Act of June 5, 1937, of the Legislature of the State of Florida amounts to fifteen cents a hundred pounds, or three and one-third times the customs duty levied by the Federal Government on hydraulic cement imported from Belgium and other non-discriminating countries. Florida is an important market for imported cement and during the year 1936, 132,039 pounds of hydraulic cement, or twenty-one per cent of the total imports into the United States, were entered in the Florida customs district. Of this cement, approximately seventy per cent was of Belgium origin. It seems probable that this large fee, which is levied only on cement imported from foreign countries and not on cement produced in Florida and other states of the Union, will effectually prevent the importation of foreign cement into Florida and consequently will impose a serious discriminatory burden upon the foreign commerce of the United States, and in view of the importance of Florida as a market for imported cement, the inspection fee will undoubtedly nullify largely the concession granted in the trade agreement. Indeed, the Belgian Government has protested to the Department of State against the Florida inspection fee, which it states, is contrary to the trade agreements and cannot fail to be a

heavy burden on trade between Belgium and the United States.

The case of *Missouri v. Holland*, a United States Supreme Court decision, reported in 252 U. S. 416, 64 L. Ed. 641, provides as follows:

> "* * * The Constitution (of the United States) as ratified by the people, made the supreme law of the land to consist of three things: 1st the Constitution; 2nd, the laws of the United States which shall be made in pursuance thereof; 3rd, all treaties made or which shall be made under the authority of the United States. . . . The powers reserved to the states respectively "or to the people are, under this Constitution as sacred as the power to make treaties. . . .
>
> "The power of the Federal Government to make and enforce treaties is not a limitation on the reserved powers of the states, but is the exercise of a power not reserved to the states under the 10th Amendment, being both expressly granted to the United States and prohibited to the states. . . .
>
> "The treaty-making power of the United States embraces all such power as would have belonged to the several states if the Constitution had not been adopted; in the exercise of that power the Federal Government is accredited agent of both the people of the United States and the states themselves. Baldwin v. Franks, 120 U. S. 678, 682, 683, 30 L. Ed. 766-768, 7 Sup. Ct. Rep. 656, 763.
>
> "The treaty-making power applies to all matters which may properly be the subject of negotiations between the two governments."

The reciprocal trade agreement which we have set forth in this brief does not contravene any prohibitory words to be found in the Constitution. In this case a question of national interest of very nearly the first magnitude is involved. The Belgian Government, one of the signers of the

treaty involved herein, has already protested to the State Department of the Government of the United States on account of the cement bill passed by the Florida Legislature in 1937.

It must be noticed that our scheme of government contemplates the delegation of certain and defined powers to national control and the reservation of equally certain powers to state or local control. Although there is with respect to the existence and location of those powers no conflict between state and Federal Sovereignties, yet, in a complicated system such as ours, wherein exist two governments over the same people, in which in different ways the laws first of one and then of the other are supreme according to the authority under which they are enacted and with reference to the subjects to which they are addressed, conflicts in the exercise of those powers are inevitable.

The Supreme Court at an early date laid down a broad formula which from that time has been the general principle governing the possibility of state exercise of power. The Court held that the states may exercise concurrent or independent power in all cases except three: (1) Where the power is lodged exclusively in the Federal Constitution; (2) where it is given to the United States and prohibited to the states; (3) where, from the nature and subjects of the power, it must necessarily be exercised by the National Government.

Volume II of "American Jurisprudence," on pages 874 and 875, holds as follows:

> "The power of Congress is exclusive whenever a state enactment would clearly be repugnant to the exercise of authority by the United States Government or whenever the subject matter is national in character so as to require uniformity of regulation affecting all the states alike. . . .
>
> "In order to determine whether a statute is a just

> exercise of the state power or is intended by roundabout means to invade the domain of Federal authority, the courts will look into its operation and effect in order to determine its true purposes."

citing *Campagnie Francaise de nav. a Vapeur v. State Board of Health,* 186 U. S. 380, 46 L. Ed. 1209.

Counsel for appellants apparently contend that this Belgian treaty or trade-agreement is unconstitutional, though the basis of unconstitutionality is not apparent to us. Clearly the Florida Act interferes with this trade-agreement and where there is such conflict we contend that the trade-agreement should be given effect and the Fla. Act held to be unconstitutional for the reasons stated hereinabove.

## THE LOWER COURT HAD JURISDICTION TO HEAR AND TO DETERMINE THIS CAUSE.

Appellants contend that Section 265 of the Judicial Code, (Sec. 379, U. S. C. A.) deprived the lower court of jurisdiction to enter any order in this cause. It is submitted that that statute is not jurisdictional; that it neither gives nor takes away any jurisdiction from the Federal Courts; that it merely protects the courts where the comity which ordinarily obtains prohibits the United States Court from making an order in the case until a similar case between the same or substantially the same parties has been determined in the state court. The question as to what constitutes a determination in the state court so that the case may no longer be regarded as "pending" therein, is not so easy to answer. It is submitted, however, that when a final order has been entered in the state court, the case ceases to be pending within the meaning of the statute, and that thereafter an injunction may be granted. The original record of the case in the Supreme Court of Florida did not disclose that thereafter a peremptory writ of mandamus had been

issued and the petitions for intervention denied, before the injunction was granted. The statute lays no prohibition on the *beginning* of a suit in the United States Court before termination of a suit in the state court, but merely states that an injunction shall not be granted to stay proceedings in any state court. No effort is made to stay proceedings in the state court by this proceeding, other than the fact that the state officers are enjoined from enforcing the provisions of the writ of mandamus and in a technical sense the writ of mandamus is a continuing writ and there never could be any time when proceedings could be stayed so that all any state would have to do to destroy the complete effect of the Constitution of the United States, would be to have the Legislature pass an unconstituitonal act; have the courts issue a peremptory writ of mandamus ordering its enforcement and thereafter the citizens of that state will be forever deprived of the rights granted them under the Constitution of the United States. Such, of course, is not the intent of the statute.

This Court in the cases of *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165, 54 L. Ed. 430, and *Smith v. Apple*, 264 U. S. 274, at 278-279-280, 68 L. Ed. 678, disposed of the question of jurisdiction in language far superior to any that we can insert in this brief, and we submit that these decisions conclusively dispose of the attempt to invoke the aid of this statute to reverse the decision of the lower court.

We have filed a motion for leave to supplement the record of the proceedings in the Supreme Court of Florida by adding thereto the proceedings therein which took place after the date (November 9th, 1937) when the record of that case up to that time, was filed. At the time this is being written we do not know whether or not that motion will be granted. If it is not, we rely on the argument and cases cited herein to sustain the decree of the lower court. If it is, the Court

will observe that the petitions for leave to intervene pending on November 9th, 1937, were denied and a peremptory writ issued all before the lower court granted the temporary injunction. That supplement will also show that these appellants *after* the injunction order hearing, moved the Court to stay all proceedings therein until *this Court* had passed on the constitutionality of the Act herein involved, and the Supreme Court of Florida entered its order granting said motion and so staying said cause. This, we think, if not an express, was at least an implied consent that this Court should determine this cause.

Besides, as we understand it, it has always been the law that the threatened enforcement, either by criminal or civil proceedings, of an Act which violates the Constitution or a statute of the United States, may be enjoined by the Federal Court, whether or not a suit be pending in the state court with reference to that Act.

See *Rast v. Van Deeman & Lewis Co.*, 240 U. S. 342, 60 L. Ed. 679.

*Ex Parte Younge*, 209 U. S. 123, 52 L. Ed. 714.

*Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 65 L. Ed. 205.

*Sovereign Camp, Woodmen of the World v. O'Neill*, 266 U. S. 292, 69 L. Ed. 293.

*Everglades Drainage Dist. v. Fla. Ranch & Dairy Co.*, C. C. A. 5th, 77 Fed. (2nd) 914.

*Bank of Kentucky v. Stone*, 88 Fed. 383, Affd. 174 U. S. 799, 43 L. Ed. 1187.

In *Chase National Bank v. City of Norwalk*, 291 U. S. 431, 79 L. Ed. 894, the State of Ohio brought action against the Power Company for a writ of quo warranto against

the Power Company to oust it against the use of the streets, alleys, etc. That Court held that the franchise had expired, entered a judgment of ouster, and that judgment was affirmed by the Supreme Court of the State of Ohio. The action had been instituted at the request and with the aid of the city, but it was not a party thereto. Chase National Bank held the bonds which the Power Company had issued. Chase National Bank brought a suit against the city in the United States District Court, and that Court granted an injunction. The Circuit Court of Appeals reversed the injunction for various reasons, one being that it was without the prohibitions of Section 265 of the Judicial Code. The Supreme Court of the United States reversed the Circuit Court of Appeals and held that the injunction was properly granted.

We submit, therefore, that the lower court had jurisdiction of the cause; that it acted within its rights in issuing a temporary injunction and later making the injunction permanent by final decree; that the Act in question is unconstitutional and invalid and infringes upon the Constitution of the United States in the respects above set forth and that the decree of the lower court was correct and should be affirmed.

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